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No. 95-63

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1995

LTV STEEL COMPANY, INC., *et al.*,

Petitioners

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENTS THE UMWA COMBINED BENEFIT FUND AND ITS TRUSTEES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether LTV's statutory obligations under the Coal Act, enacted in 1992, should be characterized as pre-petition claims in the LTV bankruptcy, a proceeding in which the bankruptcy petition was filed in 1986, six years before the Coal Act was passed.

2. Whether the Coal Act, in establishing new trust funds and a new *statutory* obligation for former employers to finance retiree health care, violates separation of powers principles when applied to a coal operator that years earlier obtained a judgment that it has no further *contractual* obligation to contribute to different multiemployer health plans established in collective bargaining.

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BRIEF OF RESPONDENTS THE UMWA COMBINED BENEFIT FUND AND ITS TRUSTEES IN OPPOSITION

Respondents United Mine Workers of America Combined Benefit Fund and its Trustees ("Combined Fund") submit this brief in opposition to the petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

In 1986, petitioners[1] sought protection under the Bankruptcy Code for the admitted purpose of trying to rid themselves of contractual commitments and promises they had made to the hundreds of coal and steel retirees who had made LTV one of the largest coal and steel operators in the world. LTV was successful in this effort, and in 1993 emerged from bankruptcy as the third largest steel company in the world. Due in significant part to the actions of LTV and others in dumping their contractual retiree benefit obligations onto collectively bargained multiemployer benefit funds that continued to be financed by a dwindling number of participating companies, a financial crisis developed in the coal industry retiree health system. Congress determined that that crisis could not be resolved through collective bargaining and that therefore a new statutory system should be devised for the delivery of health care to coal industry retirees and their dependents. The Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act") was the result. The statute was enacted in 1992, six years after LTV's bankruptcy was filed.

Having successfully shed its contractual obligations and reorganized as a substantial company, LTV now seeks once again to avoid its obligations, this time those imposed under the Coal Act. LTV relies on two factually and legally flawed premises; first, that the obligations imposed by Congress for the first time in 1992, six years *after* LTV filed its bankruptcy petition, constitute pre-petition claims

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[1]Petitioners are LTV Steel Company ("LTV Steel"), BCNR Mining Corporation ("BCNR"), Nemacolin Mines Corporation ("Nemacolin"), and Tuscaloosa Energy Corporation ("Tuscaloosa") (collectively "LTV").

dischargeable in bankruptcy, and second, that Congress' imposition of statutory obligations somehow violates the separation of powers doctrine because it conflicts with judicial decisions declaring that LTV's prior *contractual* obligations had come to an end with the expiration of the last collective bargaining agreement that LTV signed. LTV makes the latter argument despite its acknowledgment that the Coal Act did not direct the reversal of any judicial decision.

In an effort to obtain review in this Court, LTV offers a statement of the case that is incomplete, misleading, and factually inaccurate. To correct the misimpressions created by LTV and to explain the background of the Coal Act and this dispute, the Combined Fund presents the following statement of the case.

LTV starts with the assertion that the court of appeals held that LTV's *contractual* obligations were sufficient to support the imposition of post-confirmation liability on LTV. As even a cursory review of the opinion below reveals, the court did no such thing. Rather, the Second Circuit's holding is that the statutory liability imposed by Congress for the first time in 1992 is not a pre-petition obligation of LTV.

LTV's complaint that it is now burdened by retiree obligations that it sought to avoid in filing its bankruptcy petition is disingenuous. LTV succeeded in avoiding its collectively bargained obligations and, as a result, emerged as an entity with substantial assets. Indeed, although LTV sought to persuade the district court that the imposition of Coal Act obligations would destroy its stability and render its plan of reorganization unconfirmable, it was forced on appeal to abandon that position after its Chief Financial Officer acknowledged at the confirmation hearing that LTV had taken

these obligations into account in formulating its plan and could meet those obligations if required to do so. On the strength of this representation, the LTV plan was confirmed in 1993.

More troubling is the assertion made by LTV in footnote 2 of the petition that its "retirees will be paid from the Fund regardless of LTV Steel's participation." This cavalier statement ignores the fact that the Coal Act is predicated on the assumption that companies that continue in business and have the financial ability to contribute to the Fund will do so. If LTV is permitted to avoid its statutory obligations, it can be predicted with certainty that other companies will follow suit, and the very crisis that Congress sought in the Coal Act to avoid will be re-created, with the result that the Combined Fund may not be able to support the retirees and they may become the burden of the public and not of the entities that Congress determined should bear the responsibility.

LTV makes a number of material misstatements in its Statement of the Case that require correction. First, the contention that the Combined Fund "chose" not to file a claim in the bankruptcy proceeding, and instead to "wait and seek payment in full" after the bankruptcy was over is both false and misleading. LTV filed this action on January 29, 1993, *before* the February 1 date on which the Combined Fund began providing benefits under the Coal Act. The funds created by the Coal Act were not even fully operational at the time this action was commenced and were not in a position to assert a claim even if the bar date in the bankruptcy had not passed (which it had, before the Coal Act was even enacted). Second, the statement conveniently ignores the holdings of the district court and the court of appeals that the

obligations imposed by the Coal Act are not pre-petition claims; they are taxes that arise annually and represent administrative obligations of the estate during the bankruptcy and obligations of the surviving entity thereafter. LTV thus complains that the Fund did not do something that the district court and the court of appeals held would be at least unnecessary and possibly improper.

In addition, and more important, LTV misstates the holding of the court of appeals. Contrary to the statement on page 7 of the petition, the court did *not* find that liabilities under the Coal Act "arise from pre-petition acts of LTV Steel." Rather, the court held that those liabilities arise from the Coal Act itself, before which LTV had no obligation to make payments to the then-nonexistent Combined Fund. Ironically, LTV's argument to the contrary is antithetical to the central theme of the constitutional challenge that LTV pursued in the courts below -- that, prior to the passage of the Coal Act, LTV had no coal retiree obligations and the Coal Act unfairly subjected LTV to such obligations. This Court need look no further than LTV's own arguments to confirm the correctness of the Second Circuit's conclusion that the Coal Act obligations are new, post-petition obligations.

Third, LTV claims incorrectly that the decision of the Second Circuit creates a conflict between the Bankruptcy Code and the Coal Act. Quite the contrary is true. The Second Circuit, in finding that Coal Act obligations are taxes within the meaning of the Bankruptcy Code, reconciled the two statutes by providing that Coal Act claims would be

treated precisely as the Bankruptcy Code provides they should be treated.[2]

Finally, LTV's argument that the separation of powers doctrine is implicated by the Second Circuit's decision is without merit. Apart from the fact that LTV did not properly preserve this issue for appeal, LTV itself recognizes that the "Coal Act by its terms does not set aside any prior judgment [and] there is no indication that Congress intended such a result." Pet. 17. It necessarily follows that a decision by the courts below enforcing LTV's Coal Act obligations does not direct a different result. LTV's judgment relieving it of its contractual obligations remains unaffected.[3]

Critical to an evaluation of the Second Circuit's decision below is an accurate description of the Coal Act and the events that gave rise to the action by Congress that LTV now challenges.

Following an extensive inquiry in 1990 by the Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal

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[2]For this reason, LTV's remark that Congress did not explicitly provide in the Coal Act that obligations under the statute should receive special consideration is beside the point. Congress did not need to do so. It created a statutory tax, and the Bankruptcy Code makes clear how such taxes are to be treated.

[3]LTV's persistent use of terms implying that the Coal Act resurrected its prior contractual obligations (*see, e.g.*, Pet. 9, asserting that the decision of the Second Circuit "reimpose[s]" liability on LTV Steel) are specious. Neither the words nor the effect of the statute revives contractual obligations. As the Second Circuit held, the statute creates new obligations, which is precisely why LTV, despite the end of its contractual liabilities, is obligated to make statutory contributions under the Coal Act.

Commission") and its own thorough review of the coal industry's collectively-bargained multiemployer retiree health care trusts, Congress passed the Coal Act. The Coal Act is codified as part of the Internal Revenue Code, at 26 U.S.C. §§ 9701, *et seq*. Through the new statute, Congress sought to resolve the severe financial crisis that threatened the collectively-bargained trusts. For more than 40 years, these multiemployer health benefit plans had provided retiree health care to retired miners and their dependents, in accordance with a series of collective bargaining agreements between the United Mine Workers of America ("UMWA") and various employers in the bituminous coal industry. These agreements are known as the National Bituminous Coal Wage Agreements or "NBCWAs."

At the time Congress enacted the Coal Act, there were two multiemployer trusts that provided health care for retired coal industry retirees and their dependents. These were the UMWA 1950 Benefit Trust which generally covered miners who retired before January 1, 1976, and the UMWA 1974 Benefit Trust which generally covered miners who retired on or after January 1, 1976 and were not receiving benefits from their former employers' individual company plan. Under the 1978 and later NBCWAs, miners who retired in 1976 or thereafter, were to receive health care coverage from their former employers' individual company plans, and the UMWA 1974 Benefit Trust was retained as an "orphan" plan to cover retirees whose former employers were no longer in business.

The financial crisis affecting these trusts reached its peak during the decade preceding the Coal Act's passage. It jeopardized the continued provision of health care benefits to more than 100,000 retired miners and their dependents. The crisis had several causes. First, as each successive NBCWA

expired, numerous employers that had signed the 1978 NBCWA or later NBCWAs and remained in business refused to sign new NBCWAs and refused to continue providing health care to their former employees. Instead, they sought to dump thousands of their retirees into the existing multiemployer health benefit plans, where their health care would be financed by other employers.[4] As a result, the trusts incurred additional liabilities and the remaining NBCWA coal operators had to pay higher contributions to fund coverage for retirees who had been abandoned by their former employers. This created a strong financial incentive for the remaining NBCWA coal operators to follow suit, thereby further undermining the trusts' financial base.[5]

Second, numerous coal industry workers retired from companies that went out of business. These "orphan" retirees were considered an industry-wide responsibility that fell on an increasingly small number of employers. Third, several

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[4]This kind of dumping of retirees is discussed in *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust*, 826 F.2d 280 (4th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988); and *UMWA v. Nobel*, 720 F. Supp. 1169 (W.D. Pa. 1989), *aff'd*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991).

[5]LTV is perhaps the best example of the employers who dumped their retirees on the former plans. In June 1988, LTV sued the UMWA and the 1974 Benefit Trust to establish that, after the expiration of the 1984 NBCWA, LTV had no continuing contractual obligation to provide health care to the retirees that LTV had been covering through its individual company plan. LTV prevailed in this litigation, did not sign the 1988 NBCWA, and dumped hundreds of its retirees into the 1974 Benefit Trust, where their health benefits were financed by other employers. *See In re Chateaugay Corp.*, 111 B.R. 399, 402 (S.D.N.Y. 1990), *aff'd*, 945 F.2d 1205 (2d Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992).

employers negotiated so-called "non-conforming agreements," which purportedly allowed the companies to reduce or discontinue contributions to one or both of the multiemployer health benefit plans. Although these agreements now have been held ineffective to relieve these employers of their prior contractual obligations,[6] they nonetheless contributed to the financial strain on the multiemployer plans. Finally, the cost of providing health benefits increased dramatically, and that increase significantly affected the UMWA health plans' annual expenses.

The uncertainty of continued health benefits for active and retired UMWA miners led to substantial labor strife in the nation's bituminous coal mining regions. One of the most serious of these labor disputes, a ten-month strike by the UMWA against the Pittston Coal Company, was settled only after the Secretary of Labor intervened. The Coal Commission was established by the Secretary as part of the settlement to analyze the retiree health care crisis and recommend a solution.

In November 1990, the Coal Commission submitted its findings and recommendations. In its report, the Coal Commission stated that ensuring the continued provision of health benefits to UMWA retirees and their dependents should be the primary objective of any proposed solution. The Commission also recognized that, because so many companies were no longer signatories to the NBCWA and were no longer supporting their retirees' health care, the collective bargaining process was inadequate to provide a long-term

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[6]*See UMWA 1974 Pension Trust v. Pittston Co.*, 984 F.2d 469 (D.C. Cir.), *cert. denied*, 113 S. Ct. 3039, 3040 (1993).

solution to the health care crisis. Accordingly, the Commission urged that Congress adopt a legislative solution.

Following the Coal Commission's report, Congress undertook its own intensive two-year examination of the subject. The Coal Act was the final product of those deliberations. In enacting the Coal Act, Congress found that

> it is necessary to modify the private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

106 Stat. 3037, *see* 26 U.S.C. § 9701 (historical note). Congress further stated that the policy of the Coal Act is:

> to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry . . . [and] to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

Id.

In the Coal Act Congress created two new trust funds to provide health care for retired miners and their dependents. One of these trusts, Respondent Combined Fund, is the product of the statutory merger of the two pre-existing collectively-bargained multiemployer health care trusts.

Congress directed that the UMWA 1950 Benefit Trust and the UMWA 1974 Benefit Trust be merged into the Combined Fund as of February 1, 1993. The Combined Fund is designed to continue health care coverage for the beneficiaries of the pre-existing trusts. *See* 26 U.S.C. §§ 9702(a)(2), 9703(a), (b), (f). In addition, Congress created the 1992 Plan to provide benefits to eligible retirees who are not beneficiaries of the Combined Fund and who are not receiving health care coverage directly from their former employers. *See* 26 U.S.C. § 9712(a), (b). The Coal Act also requires companies that provided retiree health care through an individual employer plan pursuant to the NBCWAs to continue providing benefits to the plan's current beneficiaries. *See* 26 U.S.C. § 9711.

Two basic policy decisions are reflected in the Coal Act. First, Congress decided to solve the retiree health care crisis on a prospective "going forward" basis, outside the ambit of the collective bargaining process. To accomplish this "fresh start," Congress provided a specific date -- February 1, 1993, the termination date of the 1988 NBCWA -- on which the old collectively-bargained system would be replaced entirely by the statutory system. *See, e.g.*, 26 U.S.C. § 9702(a)(2).

Second, Congress decided that "those companies which employed the retirees in question, and thereby benefitted from their services, will be assigned responsibility for providing the health care benefits promised in their various collective bargaining agreements." 138 Cong. Rec. S17603 (daily ed. Oct. 8, 1992) (reproducing proposed conference committee report). The Coal Act implements this "pay for your own" policy (i) by requiring companies to continue their own individual employer plans to provide

ongoing benefits to their own post-1975 retirees, 26 U.S.C. § 9711; (ii) by "assigning" companies financial responsibility for their own retirees in the Combined Fund, 26 U.S.C. §§ 9704, 9706; and (iii) by requiring any existing companies whose retirees receive benefits from the 1992 Plan to pay to the Plan a per beneficiary premium sufficient to cover the health care costs of such retirees, 26 U.S.C. § 9712.

LTV Steel was a major participant in the collectively bargained multiemployer structure for most of that structure's existence. The company was a product of the merger of three major companies, all of whom were founders of the BCOA and all of whom participated in the collectively bargained plans.[7] LTV employed hundreds of coal miners who are now retired, and whose health benefits have been statutorily mandated by the Coal Act.

In January 1993, LTV filed this action in the United States District Court for the Southern District of New York, in anticipation of the assignment of numerous retirees by the Secretary of Health and Human Services ("HHS") pursuant to the Coal Act. LTV alleged that the Coal Act violated the Due Process and Takings Clauses of the Fifth Amendment

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[7]These companies (Jones & Laughlin Steel Corporation, Republic Steel Corporation and Youngstown Sheet and Tube Corporation), along with Olga Coal Corporation, founded the BCOA in 1950. LTV Steel currently owns a majority interest in Olga Coal. As a result of the merger that created LTV Steel, BCNR, Tuscaloosa and Nemacolin became wholly owned subsidiaries of LTV Steel. Prior to the merger, BCNR and Tuscaloosa were wholly owned subsidiaries of Republic Steel Corporation, and Nemacolin was a wholly owned subsidiary of Youngstown Sheet and Tube Corporation.

and that its Coal Act obligations should be discharged in its bankruptcy.[8]

The district court denied LTV's motion for summary judgment on the bankruptcy-related claim on May 11, 1993, and granted the motion of the Combined Fund for summary judgment on that count on December 15, 1993. The court of appeals affirmed. The courts below also rejected LTV's constitutional challenges and LTV has now abandoned those claims.

The court of appeals ruled that LTV is liable for premiums assessed against it pursuant to the Coal Act. The court endorsed the district court's conclusion that "Coal Act obligations are appropriately described as 'taxes' due to their overwhelmingly involuntary nature, their explicitly stated public purpose, and their obvious potential to be imposed pursuant to the taxing power." Pet. App. A-43. These taxes come due each month, and are calculated based upon the number of LTV's retirees receiving benefits from the Combined Fund at the time the premium is assessed.[9] The

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[8]Contrary to LTV's suggestion in the petition, the Complaint did not contain a count alleging violation of the Separation of Powers doctrine.

[9]Having argued below that Coal Act obligations should not be considered taxes within the meaning of the Bankruptcy Code (despite having so characterized them in its own Complaint, *see* Pet. App. C-8 n.4), LTV now claims that the characterization of the obligations is irrelevant. Pet. 9 n.4. LTV's statement is correct if what it means is that the tax characterization does not dispose of the question whether the obligations are pre- or post-petition. The statement is wrong if LTV suggests that the status of the obligation is irrelevant under the Bankruptcy Code. As both courts below held, and as the Bankruptcy Code makes

(continued...)

Court further held that, "the portion of LTV's Coal Act liability accruing during the pendency of its bankruptcy is entitled to treatment as an administrative expense of the estate pursuant to section 507(a)(1). The remainder of LTV's obligations was not dischargeable in bankruptcy and is an obligation of the reorganized LTV." Pet. App. A-43-44.

LTV now petitions for a writ of certiorari, arguing that the Second Circuit's decision is in conflict with decisions of other circuits. In addition, LTV argues for the first time that the Coal Act violates the separation of powers doctrine arising under Article III, section 1, of the United States Constitution.

ARGUMENT

The decision of the court of appeals is correct, and review by this Court is not warranted. Contrary to LTV's claims, there is no conflict among the circuits on any issue affecting this case. No other court of appeals has addressed the treatment of Coal Act claims in bankruptcy, and the Second Circuit's decision is in accord with the decision of every other court of appeals that has addressed what constitutes a claim in bankruptcy, or that has considered whether new and previously non-existent obligations under a statute passed after the filing of a bankruptcy petition constitute pre-petition obligations subject to discharge in bankruptcy.

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[9](...continued)
clear, the character of the obligations as taxes has significance for their treatment during and after the bankruptcy proceedings.

LTV's second argument fares no better. The separation of powers contention was not properly preserved below and is, in any event, unavailing. As LTV itself acknowledges, the Coal Act neither directs the overturning of prior judgments nor seeks to revive previously existing liabilities. LTV succeeded in disposing of its contractual obligations; that it is now subject to different statutory obligations has no effect on prior judicial decisions, and the separation of powers doctrine is neither implicated nor violated by the action of Congress or the court of appeals.

I. THE CASE RAISES NO CONFLICT AMONG THE DECISIONS OF THE COURTS OF APPEALS

As noted above, no other court of appeals has ruled on the character of Coal Act obligations in bankruptcy proceedings.[10] There is therefore no split among the circuits on that issue. Similarly, there is no split among the circuits on the issue of the proper treatment of tax obligations under the Bankruptcy Code. LTV also offers no authority inconsistent with the Second Circuit's evaluation of what constitutes a claim in bankruptcy: the Second Circuit joins the other circuits in concluding that claims in bankruptcy should be broadly defined, but there is no court of appeals that has held that a statute passed years after the filing of a petition in bankruptcy and creating new, previously non-existent liabilities can be considered to create a pre-petition

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[10]The only other court of appeals decision concerning the Coal Act reached the same conclusion as the Second Circuit in sustaining the Act's constitutionality. *See Barrick Gold Exploration, Inc. v. Hudson*, 47 F.3d 832 (6th Cir. 1995), *cert. pending*, No. 94-1938 (filed May 24, 1995). As noted above, LTV has not pursued its constitutional challenges to the Coal Act in this Court.

claim. LTV's argument to the contrary relies on a misstatement of the holding of one case from the Seventh Circuit and a convoluted attack on a decision of the Third Circuit that is immaterial to the Second Circuit's holding.

LTV contends that the Second Circuit's decision requires a definition of "claim" under the Bankruptcy Code which is "inconsistent with the decision of every other court of appeals, other than the Third Circuit, which have analyzed the scope of the 'claim' definition." Petition 10. LTV is simply wrong. The standard applied by the Second Circuit in reaching its decision that Coal Act premiums assessed against LTV are not pre-petition, dischargeable obligations is one which has been used in different cases by a number of courts of appeals. Indeed, while LTV disputes the *outcome* of the application of this standard, it does not appear to challenge the standard itself. As no other court of appeals has reviewed the treatment of Coal Act claims in bankruptcy, a split among the circuits is not possible.

The Bankruptcy Code defines a "claim" as a

> right to payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

11 U.S.C. § 101(5)(A). There is no dispute among the circuits that "[a] claim exists only if *before the filing of the bankruptcy petition*, the relationship between the debtor and the creditor contained all the elements necessary to give rise to a legal obligation -- 'a right to payment' -- under the relevant non-bankruptcy law." *In re Nat'l Gypsum*, 139 B.R. 397, 405 (N.D. Tex. 1992) (emphasis added). *See also*

United States v. Union Scrap Iron & Metal, 123 B.R. 831, 835 (D. Minn. 1990); *In re UNR Indus., Inc.*, 29 B.R. 741, 745-46 n.4 (N.D. Ill. 1983). A "right to payment" means "an enforceable obligation." *Johnson v. Home States Bank*, 501 U.S. 78 (1991). *See also In re Geiger*, 143 B.R. 30, 33 (E.D. Pa. 1992), *aff'd*, 993 F.2d 224 (3d Cir. 1993). Thus, a claim does not arise unless and until there is a legal right that, under the appropriate circumstances, will or could mature into a right to payment. If that legal right does not exist on the filing date, there is no pre-petition claim.[11] LTV points to no conflict among the circuits on this issue.

Although this is precisely the standard applied by the Second Circuit, LTV claims that the court's conclusion that, because the Coal Act was passed long after the bankruptcy petition was filed, none of LTV's Coal Act obligations constitute "pre-petition" claims creates a conflict among the circuits.

LTV cites only one case, *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 3 F.3d 200 (7th Cir. 1993), in support of its assertion that such a conflict exists. In *Chicago, Milwaukee*, the Seventh Circuit held that a creditor's indemnification claims arising under CERCLA were barred because the creditor failed to file a timely claim prior to the final bar date *for potential environmental liability of which it was aware prior to the bar date*. Indeed, the EPA had listed the site in question on its list of most dangerous cleanup sites. This case is easily distinguishable -- Coal Act liability could not have been known prior to the bar date because the Coal

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[11] *See, e.g.*, H.R. Rep. No. 595, 95th Cong., 2d Sess. 309, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266 (congressional intent was to encompass all "legal obligations" existing on filing date).

Act did not exist. In addition, Coal Act premiums are, by nature, different from environmental clean-up costs, in that they are tax obligations that accrue on an ongoing basis as long as the company has retirees receiving benefits from the Combined Fund.

Moreover, LTV ignores the second, and more pertinent, issue reviewed by the Seventh Circuit in *Chicago, Milwaukee, i.e.*, the potential indemnification assessment against the debtor for liabilities owed pursuant to a state environmental statute that, like the Coal Act, was enacted after the bankruptcy petition was filed.[12] The Seventh Circuit did not find the newly-created claim barred, and remanded the issue for further findings as to "what liabilities under the Model Act existed in 1985 by virtue of Washington state statutes then in effect." 3 F.3d at 208. On remand, the district court held that the Model Act introduced a new statutory scheme and the liabilities established by the Model Act did not exist previous to its passage. *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 1995 U.S.Dist.LEXIS 10060 (N.D. Ill. July 14, 1995). The court therefore denied the reorganized entity's motion to enjoin indemnification, despite the fact that the statute in question referred to pre-petition conduct in identifying persons subject to its application. A review of the Seventh Circuit's decision makes clear that its conclusions and that of the Second Circuit are in accord.

LTV's only other argument in support of its bankruptcy-related claims consists of an attack on a decision not relied upon by the Second Circuit, that is at least three

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[12]Model Toxics Control Act, Wash. Rev. Code ch. 70.105D (the "Model Act").

steps removed from the analysis of the Second Circuit, and that the district court explicitly recognized was not pertinent to the issues in this case. Although difficult to divine, LTV's contention appears to be that the Second Circuit's reliance on one decision is flawed because that decision relied on another, which in turn relied on another that LTV contends is wrongly decided and with which some courts have expressed disagreement. That the Second Circuit did not rely on the allegedly-discredited opinion, and that the opinion does not relate to the issues present here, are ignored by LTV. In any event, LTV's analysis is incorrect.

LTV challenges the Third Circuit's decision in *In re Penn Central Transp. Co.*, 944 F.2d 164 (3d Cir. 1991), *cert denied sub nom. Penn Central Corp. v. United States*, 503 U.S. 906 (1992)[13] arguing that the *Penn Central* decision should be disregarded because it "derives from an analysis first adopted by the Third Circuit in *In re M. Frenville Co.*, 744 F.2d 332 (3d Cir. 1984), *cert. denied sub nom M. Frenville Co. v. Avellino & Bienes*, 469 U.S. 1160 (1985)." Apparently, LTV bases this argument on the Third Circuit's citation, in *Penn Central*, to *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985), which in turn relied upon *Frenville*, a decision that has been criticized by some other courts. Any criticism that may be directed toward the *Frenville* decision is inapplicable

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[13]It should be noted that the Seventh Circuit did not regard the Third Circuit's decision in *Penn Central* to be inconsistent with its findings in *Chicago, Milwaukee*. Rather, the court noted that "CMC acknowledges that the Model Act went into effect after the bar dates and that several courts have held that claims based on a statute enacted after discharge in bankruptcy are not barred." *Chicago, Milwaukee*, 3 F.3d at 208 (*citing Penn Central*).

here, however, as *Penn Central* did not refer to, or rely on, that case. Indeed, *as the district court explicitly found* (Pet. App. C-6 to C-7 n.2) the issue decided in *Frenville* does not even relate to the discussion at hand.[14] LTV is thus unable to support its contention that there is a split in the circuits over any issue pertinent to this appeal. LTV's request for review of the Second Circuit's decision on the bankruptcy issues should therefore be denied.

II. LTV DID NOT PRESERVE A SEPARATION OF POWERS ARGUMENT BELOW

In its petition, LTV states that it "sought a declaratory judgment that the imposition of Coal Act liabilities on LTV Steel would violate ... the separation of powers doctrine because it would vitiate the prior final judgment holding LTV Steel free of liability for mine worker retiree claims." Pet. 7. This assertion is inaccurate. Although LTV claimed that the prior judgment declaring that LTV's contractual obligation had come to an end supported LTV's demand for summary judgment on its bankruptcy claims, it did not characterize that position, or give either the district court or the court of appeals an opportunity to evaluate it, as a separation of

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[14]The portion of *Frenville* with which other courts have disagreed is the holding that "a right *to payment* must exist prior to the filing of the petition." *Grady v. A.H. Robins Co., Inc.*, 839 F.2d 198, 202 (4th Cir.), *cert. dismissed sub nom Joynes v. A.H. Robins Co., Inc.*, 487 U.S. 1260 (1988). In addition, criticism directed toward *Frenville* was also due to the fact that *Frenville* determined the "right to payment" by reference to state law, thereby "fail[ing] to recognize federal bankruptcy policy as 'overriding federal law.'" *See In re Black*, 70 B.R. 645, 649 (D. Utah 1986). The Third Circuit relied upon neither holding in reaching its decision in *Penn Central* that no "claim" existed prior to enactment of the statute under which such a claim would have been asserted.

powers issue. It was offered, if at all, as a res judicata or collateral estoppel issue. This Court should not grant review of an issue not presented to the lower courts.[15]

It is well settled that issues raised for the first time in a petition for certiorari cannot properly be considered by this Court, absent exceptional circumstances not present here. *See Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Accordingly, the issue of violation of the separation of powers doctrine is not properly before the Court and provides no basis for review.

III. ASSESSMENT OF COAL ACT OBLIGATIONS DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE

Even if LTV's separation of powers argument were properly before the Court, it is without merit and does not warrant review. As discussed above, LTV maintains that, because it obtained a judgment establishing that its *contractual* obligation to provide benefits to its retirees terminated in 1988 at the expiration of its collective bargaining agreement with the UMWA, the enforcement of the Coal Act's *statutory* obligation offends separation of powers principles. In support of this contention, LTV relies upon this Court's recent decision in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. ___, 115 S. Ct. 1447 (1995), in which section 27A(b) of the FDIC Improvement Act of 1991 was

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[15]The Second Circuit, in summarizing the issues before it, stated that "LTV alleges two constitutional deficiencies in the Coal Act: first, that the Act violates the Due Process Clause, and second, that the Act constitutes a taking of private property without just compensation." Pet. App. A-17.

challenged because it lengthened the statute of limitations for certain securities actions and expressly required courts to reinstate private actions that had been dismissed as time-barred pursuant to an earlier Court ruling. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). Section 27A(b) was held to violate the separation of powers doctrine.

Plaut is plainly inapposite here. The Court in *Plaut* considered legislation that expressly sought to reopen final judgments and reinstate the very causes of action that had been laid to rest by those judgments. In contrast, the Coal Act's requirement that LTV pay statutorily-imposed premiums on behalf of its retirees and beneficiaries has no effect whatsoever on the final judgment entered in the earlier litigation relieving LTV from contractual obligations to its retirees. Rather, it represents a new statutory obligation determined by Congress to be necessary as a matter of public policy. Consequently, the Coal Act does not raise any of the constitutional issues present in *Plaut*.

The Coal Act establishes a prospective, statutory obligation that leaves earlier decisions concerning LTV's contractual liability unaffected. The *Plaut* decision has no effect on this case; it is limited to legislative acts that "compel the Federal courts to vacate, revise, or reconsider final judgments rendered in cases between private parties." *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487, 1497 (6th Cir. 1993), *aff'd*, 514 U.S. ___, 115 S. Ct. 1447 (1995). Even LTV acknowledges that this is not the case here. *See* Pet. 17.

Under the earlier judgment on which LTV relies, LTV's contractual obligation to provide benefits to its retirees was determined to have expired. No one contends otherwise.

But that judgment did not purport to address any future statutory obligations that might arise under later legislation, nor could it have done so if it had tried. Application of the Coal Act contribution obligations to LTV does not require any alteration, revision, or vacating of the earlier judgment. Cases such as *Plaut*, where the legislation called upon the court to reopen a final judgment and reinstate a dismissed cause of action, raise issues simply not present in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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